No. 12,502

IN THE

United States Court of Appeals

For the Ninth Circuit

W. E. BUELL, Trustee for the Bond Holding Creditors of the Montague Water Conservation District,

Appellant,

vs.

MONTAGUE WATER CONSERVATION DISTRICT, Bankrupt, and THE CITY OF MONTAGUE,

Appellees.

BRIEF FOR APPELLEE.

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STATEMENT OF FACTS.

In addition to the facts recited in Appellant's Opening Brief (page 2), it may be stated that the property in question was considered in the execution of the composition agreement and expressly excluded from the schedules attached thereto. (Transcript page 14.) The District Court, pursuant to said agreement, made its order as to the proper notice to be given all landowners in the District. All properties in the District which were to be assessed were set forth, and

those properties not to be assessed were expressly omitted from the schedules attached to the agreement, as was the property in question. Some three years after the execution, approval and confirmation of said agreement, without any permission or approval of the District Court, an assessment was levied against the property in question for the sole purpose of discharging the bonded indebtedness, the subject of the composition agreement. The City of Montague brought a petition for equitable relief and for interpretation of the composition agreement, as a landowner within the District and affected by said agreement.

STATEMENT OF APPELLEE'S POSITION.

Appellee takes the position that, as a landowner within the District, and according to the notice required to be given, and having been expressly excluded from the schedule to said composition agreement, it was a party contemplated within the agreement and was intended to rely thereon, since said composition agreement affected all property within the bankrupt District.

That the District Court had jurisdiction to interpret the composition agreement which it confirmed in the reorganization proceedings taken before it, as affecting all landowners within the bankrupt District.

That the evidence and Findings support the judgment of the District Court.

ARGUMENT.

The Designation of Points Relied upon on Appeal filed by Appellant recites the following points:

a. That the Court has no jurisdiction to hear the petition of the Appellee of the Town of Montague.

b. That the Court erred by law in finding that the said Town of Montague was injured by the proposed action of bankrupt of the Montague Water Conservation District.

c. That the Findings do not support the judgment. (See Transcript page 25.)

In Appellant's Opening Brief he has raised additional points not heretofore adjudicated nor specified in his Designation of Points Relied upon on Appeal, to-wit: 1. That the City of Montague is not a proper party; 2. That the District Court had no jurisdiction to enjoin the levy of a tax. It would appear that these two points are before this Court for the first time. With respect to the latter point, Appellant has cited a line of cases in support of his contention that the District Court had no jurisdiction to enjoin the levy of a tax. These cases deal with general taxation levies. There is no issue with respect to the payment of general taxes levied by the bankrupt District. Such taxes have always been paid and are currently paid by the City of Montague. The cases cited by Appellant in Appellant's Opening Brief at page 3 are not in point. The only levy by the bankrupt District which is involved in the case at bar, is the levy made against the Airport Property owned

by the City of Montague for the express purpose of discharging the bonded indebtedness, the subject of the composition agreement, which levy the District purported to make long after the composition agreement was accepted and confirmed by the District Court and contrary to the terms thereof.

The case cited by Appellant on page 4 of Appellant's Opening Brief in support of the contention that there is no proof that Appellant first paid the taxes due and which is a prerequisite to bringing an action to set aside an assessment, is definitely not in point and tends to confuse the issue involved. The case so cited deals with general taxation, which is not involved in the case at bar.

Appellant further raises the new point that the City of Montague is not a proper party. The case cited by Appellant is not in point. The composition agreement affected and intended to affect all the landowners in the bankrupt District. The parcels of land expressly excluded, as was the case respecting the Airport property, were just as much a part of and affected by the composition agreement, as were the properties expressly included in said agreement. The composition agreement was offered and accepted by the creditors with the intent that all landowners within the District were to rely thereon as affecting their respective property within said District. Appellant has admitted and as appears by stipulation (Transcript page 14) that in the preparation and final execution of the composition agreement, the property in question was

considered and was expressly omitted and excluded from the schedule to said agreement. The City of Montague relied thereon. In further support of the point that the City of Montague is a proper party, we call the Court's attention to the Notice of Hearing Upon Plan of Composition, which was published as ordered by the District Court, wherein it states in part, "Creditors of the District and the landowners therein are hereby referred to the petition and plan of composition attached thereto, now on file with the Clerk of the above-entitled Court for details and particulars of the proposed plan of composition and the proceedings taken and to be taken therein." It is quite apparent that Appellant's position is without merit.

According to the records and files in the above matter a plan of composition was duly and regularly filed with the District Court under the provisions of Sections 81-84 of the Bankruptcy Act was accepted by Appellant on behalf of all the creditors and, on petition duly filed before the District Court, was, by said Court, confirmed. A composition is a settlement of the bankrupt with his creditors, in a measure superseding and originates in a voluntary offer by the bankrupt, and results from voluntary acceptance by his creditors. The respective rights of the bankrupt and the creditors are fixed by the terms of the offer, and upon confirmation of the composition they get what they bargained for and no more. (*Schram v. Perkins,* 38 F. Supp. 404; *Myers v. International Trust Co.,* 273 U.S. 380, 383; 47 S. Ct. 372, 71 L. Ed. 692.)

A composition with creditors partakes of the nature of a contract, in a measure superseding and outside a bankruptcy proceeding, and is an offer and acceptance whereby the respective rights of a bankrupt and creditors are fixed by the terms of the offer on its confirmation. (*Barker v. Ackers,* 29 Cal. App. (2d) 162, 84 P. (2d) 264.)

In the case at bar, the plan of composition provided, among other things, that the bondholders through their trustee, W. E. Buell "will accept from any individual land owner in the district in full settlement of the liability of such land for the payment of all the outstanding bonds and coupons of the District, whether due or to become due, the amount set forth in Exhibit 'B' opposite the description of such land in the column marked 'Cash Price' * * * and give full releases therefor * * *" A provision was also made for term price. (See Composition Agreement Paragraph I.) All the property in the District was considered and the property which was to be assessed was set forth on the schedule which was a part of the composition agreement and the amounts allocated set forth. (See Exhibit B Composition Agreement.) The composition agreement approved by the District Court and the property therein set forth, was intended to satisfy the full bonded indebtedness. In the plan of composition the bankrupt District offered to make the levies as shown on the schedules attached to the agreement in liquidation of the entire bonded indebtedness, which the creditors accepted and which was confirmed by the District

Court. The creditors are entitled to no more. Some three years after the confirmation of the composition agreement, W. E. Buell, as trustee for the bondholders, induced the bankrupt to further make an arbitrary assessment against the property in question for the sole purpose of discharging the bonded indebtedness, the subject of the composition agreement. If any assessment was to be made against the property in question the property should have been listed in the Composition Agreement and a sum allocated against the property. Appellee would then have received the notice which was ordered by the District Court and would have had an opportunity to redeem its property similar to other property owners within the District. As a jurisdictional fact all parties in the District whose property was listed in the agreement were notified by proper notice ordered by the District Court. The notice ordered was directed to all property owners in the District listed in the composition agreement schedules, which notice was to be by publication and personal service. The City of Montague did not receive such notice, as supported by the pleadings and evidence. Had the property in question been set forth on the schedule to the composition agreement and an amount allocated against it, Appellee would have had three elective rights, as follows: 1. Paid the cash price and received full releases therefor; 2. Taken advantage of the term price; 3. Objected to the amount of, or any assessment, or amount allocated against the property. The intentional acts of Appellant and the representations made by him, lulled Appellee into a state of inaction.

The Composition Agreement, being in the nature of a contract (*In re Adler,* 103 Fed. 444; *Myers v. International Trust Co.,* 273 U.S. 380, 383; *Hansen et al. v. Wingren,* 121 Fed. (2d) 1011, 1012) between the District and all creditors and between the creditors themselves, the parties to the composition should be governed by the rules usual in contract matters. Section 1962 (3) of the California Code of Civil Procedure provides a conclusive presumption, as follows:

> "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

Appellant is entitled to nothing further than it agreed to accept by the composition agreement. At this time practically all of the properties in the District have been released by payment of the amounts allocated and set opposite the respective properties. Appellant has no authority or right to demand any further payments than afforded by said composition agreement.

Appellant further raises the point that a Court sitting in Bankruptcy has no equitable powers, but admits the point is not in issue. Not only is the point not in issue, but such contention is not supported by the case cited nor by the general rule. Appellee is unable to find the statement of Appellant on page three of Appellant's Opening Brief that such court has not even the slightest vestige of equitable powers. Bank-

ruptcy Courts are courts of equity without terms, and a corporation is open to re-examination until the closing of the proceedings. (*National City Bank of N. Y. v. O'Connell,* 155 F. (2d) 329.) The Chandler Act has for its purpose the rehabilitation of distressed business organizations through reorganization, and its effect is to place every phase of the debtor's business under the supervision of the Court which had exclusive jurisdiction over the debtor and its property during the reorganization period. (*In re Quick Charge,* 69 F. Supp. 961.) A proceeding for reorganization of a corporation is one in equity. (*In re Peterson's Motor Exp.,* 84 F. Supp. 230.) In voluntary reorganization proceedings, where debtor owned three oil and gas leases and was engaged in the business of drilling oil, the bankruptcy court had jurisdiction to pass upon the rights of the holder of overriding royalty interest and to direct cancellation of overriding royalty interests as part of proposed plan. (*In re Engineers Oil Properties Corp.,* 72 F. Supp. 989.) There is, therefore, no question but that the District Court had the right to interpret the composition agreement which was confirmed by said court as to the rights of all the property owners within the District, all of whom were affected by the said agreement, whether set forth on the schedules attached thereto, or expressly excluded therefrom.

It is further of interest that although the property in question was referred to as the Airport Property, the evidence is conclusive that a greater portion thereof has always been held and is presently being

held for the purpose of a sewage disposal area, and that another portion thereof is and has been for some years been held and used as a city dump ground.

In summarization, to permit the bankrupt District, at the instance of Appellant, to assess the property in question would be in direct violation of and in excess of the rights provided for and agreed upon in said composition agreement, and upon which agreement all property owners within the District were to rely. Appellee further contends it was denied its right to compromise any bonded indebtedness as were other property owners within the District; that the bondholders would receive property not contemplated or agreed upon in the composition agreement; that the Appellee would be deprived of its property without due process of law, in view of the notice provided being jurisdictional.

CONCLUSION.

The judgment estopping the bankrupt District from assessing the property in question for the sole purpose of discharging the bonded indebtedness, long after the acceptance of the composition agreement by the creditors and confirmation by the District Court, should be sustained. The District Court had jurisdiction to interpret the composition agreement by the creditors and confirmation by the District Court should be sustained. The District Court had jurisdiction to interpret the composition agreement with respect to the rights afforded the bankrupt and the

creditors. Appellee is a proper party in that the composition agreement intended to and did affect all property owners within the District and each of such owners was intended to rely upon said agreement. The contention of Appellant with respect to the enjoining of the levy of a tax, is not well taken and tends to confuse the issue, there being no question as to the levy of the general taxes by the District, which taxes have always been paid by Appellant. The judgment of the District Court is just and equitable.

Dated, Yreka, California,
March 12, 1951.

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